YEOH KHOON CHOOI

v.

PATTO A/L PERUMAL & 2 ORS.

HIGH COURT MALAYA, PENANG
TAN SRI DATO' ANUAR BIN DATO' ZAINAL ABIDIN CJ (MALAYA)
[ELECTION PETITION NO. PP-2-1995]
28 AUGUST 1995

ELECTION LAW: *Election petition - Request for recount of votes cast rejected by Returning Officer - Court requested to exercise inherent jurisdiction to order recount - Whether any failure to observe the due process of law - Election (Conduct of Elections) Regulations 1981, rr. 25(13)b & 25D(5A).*

PRACTICE & PROCEDURE: *Election petition for order to recount votes - Application to strike out - Whether petition discloses reasonable cause of action.*

At the general elections held on 25 April 1995, the petitioner lost to the 1st respondent who was declared the winner by a majority of 118 votes and was elected and returned to the Parliamentary Constituency of Bagan. Being dissatisfied with the result, the petitioner filed his election petition in which he stated that he was aggrieved at the Returning Officer's refusal of his request, *via* his authorised agent, to recount the votes cast. In view of the very slim majority the petitioner stated that the Court could under its inherent jurisdiction order a recount and/or scrutiny of the votes. Meanwhile, the 1st respondent passed away before the hearing of the petition and was substituted by a registered voter from the same Constituency. The applicant/respondent applied to strike out the petition on the ground that it did not disclose any reasonable cause of action.

The respondent *inter alia* raised objections that the petition was misconceived and in breach of the Election Petition Rules 1954 and the Election Offences Act 1954. Furthermore he contended that the recount could only be ordered by the Pesiding Officer of a polling station pursuant to r. 25(13) of the Elections (Conduct of Elections) Regulations 1981 (the Regulations) and not by the Returning Officer at a tallying centre.

The question was whether there had been failure to observe the due process of law.

Held:

[1] It is clear under r. 25(13)b of the Regulations that any application for recount shall be made before the Presiding Officer makes the announcement of the result of the counting of votes at his polling station. An application for a recount therefore can only be made to a Presiding Officer at the polling station who will decide whether to accede to the request or not. The rule is very clear that no other person has the power to order a recount.

[2] Under r. 25D(5A), the only request that can be made is for the number of votes recorded to be added up again. It is not a recount of votes. Therefore a Returning Officer has no power to carry out a recount of votes and the petitioner's request for a recount of votes was rightly refused by the Returning Officer.

[3] The Rule has clearly set out when and where a request for a recount should be made if the petitioner wishes to have the votes recounted. If he does not follow the clear and unambiguous rules as provided, he cannot complain of any breach of natural justice against him nor can he say that the Returning Officer failed to observe the due process of law.

In the circumstances, the Court cannot exercise its inherent jurisdiction to remedy something which has not been wronged.

[4] There is no cause of action disclosed in the petition. Accordingly, the petition is dismissed with costs to the respondents.

Per curiam:

In an election petition there can be no room for the exercise of the inherent jurisdiction of the High Court. This is because it is settled law that the statutory requirements of election law must be strictly observed. The primary purpose of the diverse provisions of election law which may appear to be technical is to safeguard the purity of the election process and the Courts will not ordinarily minimise their operation. The Court would not exercise its inherent power to interfere with the operation of the Election Petition Law.

[Petition dismissed with costs to respondents. P.Patto duly elected under s. 36 of the Election Offences Act 1954].

Case referred to:
Harcharan Singh v. Mohinder Singh [1968] SC AIR 1500 ***(refd)***

Legislation referred to:
Election Offences Act 1954, s. 36
Elections (Conduct of Elections) Regulations, 1981, r. 25(13)b, 250(5A)

For the petitioner - RJ Manecksha; M/s. Ong & Manecksha
For the first the respondent - Karpal Singh (K. Balasundaram & Jagdeep Singh Deo a/l Karpal Singh with him) M/s. Balasundram & Co.
For the second respondent - Al-Baishah bt Hj. Abdul Manan (Syed Marzidy with her)

JUDGMENT

Anuar bin Zainal Abidin CJ (Malaya):

This is an election petition filed by the petitioner Yeoh Khoon Chooi who was a candidate at the general elections held on 25 April 1995.

The first respondent P. Patto was also a candidate at the general elections held on the 25 April 1995.

The second respondent, Mohd. Zahari bin Senu, was the Returning Officer.

The petitioner obtained (polled) 26,406 votes. The first respondent obtained 26,524 votes. As a result, the first respondent was declared the winner by a majority of 118 votes and accordingly elected and returned to the Parliamentary Constituency of Bagan.

The petitioner is dissatisfied with the result of the election and therefore instituted the election petition proceeding. The petitioner filed his election petition on 24 June 1995.

The petitioner in his petition states that at about 11.45 p.m. his authorised agent, Ooi Bak Koh @ Wei Bak Hoe, requested the Returning Officer for a recount of the votes cast in the Parliamentary Constituency. The request was refused.

The petitioner states that he is aggrieved at the refusal of the Returning Officer to the request in view of the fact that the majority was a very slim majority. The difference between the number of votes cast for the respondent and the petitioner is less than 1% of the total number of votes cast. In view of the very slim majority the petitioner states in the petition that the Court could under its inherent jurisdiction order a recount and/or scrutiny of the votes.

The first respondent passed away on 12 July 1995 before the date of the hearing of the election petition.

Subsequently Asogan a/1 Govindaraju, a registered voter in the Parliamentary Constituency of Bagan, applied to be made a respondent in the petition. This application was fixed for hearing on 24 August 1995. On 24 August 1995 the applicant was named a respondent in the petition as there was no objection to the application.

The applicant also applied to strike out the petition on the ground that the petition does not disclose any reasonable cause of action.

At the outset the learned Counsel for the applicant/respondent urged the Court to hear the applicant/respondent's application first before hearing the petition itself. The Court agreed with the application to hear the objection raised by the applicant/respondent first.

The objections raised by the applicant/respondent are set out in his affidavit in Encl. (23):

> 2.(1) The contention by the petitioner that the Court has inherent jurisdiction to order a recount and/or scrutiny of the votes or that there was a breach of the rules of natural justice is misconceived and unsupportable in law;
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> (2) The petitioner has not specifically stated in his petition noncompliance with any specific provision of any written law relating to any election and further that such non-compliance has affected the result of the election;
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> (3) The petition is in breach of r. 4(l)(a) of the Election Petition Rules, 1954 in that it does not state the right of the petitioner to petition within s. 34 of the Election Offences Act, 1954;
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> (4) The petition does not ask for any prayer that the petitioner be declared duly elected or duly returned and
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> (5) A recount can only be ordered by the presiding officer of a polling station pursuant to the provisons of regulation 25(13) of the Elections (Conduct of Elections) Regulations, 1991 and not by the Returning Officer at a tallying centre where the votes are tallied after results are received from the respective polling stations in a constituency whence the Returning Officer at the conclusion of the tallying officially declares the result relating to the election in that constituency.

It is clear from the petition that the petitioner is asking the Court to exercise its inherent jurisdiction as stated in paragraph II of the petition.

The terms "inherent jurisdiction of the Court" have been described in *Halsbury* in the following words:

> In sum, it may be said that the inherent jurisdiction of the Court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just and equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them *(Halsbury Laws of England* 4th Ed. Vol. 37 para 14).

The inherent jurisdiction of the Court therefore is to be exercised with certain principle, the most important being to ensure the observance of the due process of law in order to do justice between contesting parties.

In the case before us the question to be asked is whether there has been a failure to observe the due process of law. The complaint by the petitioner is that he was not given the right to have a recount of votes cast at the election. It is necessary to examine the

relevant provision of the rules regarding the procedure for a recount. Rule 25(13)b of the Elections (Conduct of Elections) Regulations, 1981 reads as follows:

> 25(13) Where -
>
> (a) the number of votes for all the .. per centum or more; or
>
> (b) the difference between the number of votes cast for the leading candidate and the number of votes cast for the next leading candidate is two per centum or less of the total number of votes cast,
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> then upon the application of either any candidate or of his election agent or counting agent a recount shall be made once only before the presiding officer carries out the proceedings set out in paragraph (12):

and, Rule 25D(5A) of the Elections (Conduct of Elections) Regulations, 1981 reads as follows:

> 25D. (5A) A candidate or his election agent may, after the completion of the official addition of votes, require the returning officer to have the number of votes recorded in the official statement of the poll to be added up again but the returning officer may refuse to do so if in his opinion the request is unreasonable.

It is clear that any application for a recount shall be made before the Presiding Officer carries out the proceedings set out in paragraph 12. That is before the Presiding Officer makes the announcement of the result of the counting of votes at his polling station. An application for a recount therefore can only be made to a Presiding Officer at the polling station who will decide whether to accede to the request or not and this application can only be made at the polling station. The rule is very clear that no other person has the power to order a recount.

Under Rule 25D paragraph (5A) it is provided that a candidate may require the Returning Officer to have the number of votes recorded in the official statement of the poll to be added up again. The Returning Officer may refuse to do so if in his opinion the request is unreasonable. Again it is clear to me that the only request that can be made under this Rule is for the number of votes recorded to be added up again. It is not a recount of votes. Therefore a Returning Officer has no power to carry out a recount of votes. If a candidate asks the Returning Officer to carry out a recount of votes that request would obviously be refused. The Returning Officer would be right to refuse such a request.

From the facts of the case before us the petitioner, through his agent, had made a request to the Returning Officer for a recount of votes which was refused. Clearly this request was made to the wrong person and it was rightly refused by the Returning Officer.

There is no evidence to show whether the petitioner or his agent had made any request to the Presiding Officer for a recount of votes at the polling station.

I am sure the petitioner is fully aware of the provisions of these Rules. He could have availed himself of the right for a recount had he wished. But he did not do so. His reason for not doing so is that he would not be able to ascertain the winning margin until the number of votes cast at the various polling station has been added. But I do not think this is a good excuse or a good reason for the petitioner not to comply with the provisions of the Regulations which are very plain and clear. It is not open to the petitioner to make his own ruling as to when he should decide to request for a recount. The rule has already clearly set out when and where a request for a recount should be made if he wishes to have the votes recounted. If the Petitioner does not follow the clear and unambiguous rules as provided he cannot complain of any breach of natural justice against him. The

petitioner cannot say that the Returning Officer had failed to observe the due process of law. No injustice therefore has been done to the petitioner. In the circumstances I do not think the Court can exercise its inherent jurisdiction to remedy something which has not been wronged.

In any event I am of the view that in an election petition there can be no room for the exercise of the inherent jurisdiction of the High Court. I hold this view because it is settled law that the statutory requirements of election law must be strictly observed. The primary purpose of the diverse provisions of election law which may appear to be technical is to safeguard the purity of the election process and the Courts will not ordinarily minimise their operation. (*Harcharan Singh v. Mohinder Singh* [1968] SC AIR at 1500) The Court would not exercise its inherent power to interfere with the operation of the Election Petition Law.

Having said this I do not think it necessary for me to deal with and consider the other grounds of objection raised by the applicant/respondent. I agree with the applicant/respondent's contention that there is no cause of action disclosed in the petition and would therefore dismiss the petition with costs to the respondents.

I order that, under s. 36 of the Election Offences Act 1954, the respondent P. Patto was duly elected.